

OFFICE OF GENERAL COUNSEL

M E M O R A N D U M

TO: Chief, PIRS

FROM: Associate General Counsel, Litigation Division

SUBJECT: Telephone Electronics Corporation v. FCC & USA, No. 95-1015. Filing of a new Petition for Review filed in the United States Court of Appeals for the District of Columbia Circuit

DATE: January 24, 1995

Docket No(s). PP 93-253

File No(s).

DOCKET FILE COPY ORIGINAL

This is to advise you that on January 6, 1995, Telephone Electronics Corporation, filed a Section 402(a) Petition for Review in the United States Court of Appeals for the District of Columbia Circuit of the FCC decision: In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding (Fifth MO&O), FCC 94-178, released November 23, 1994.

Challenge the denial of adopted rules governing eligibility to bid in the auction for licenses in the entrepreneurs' blocks for the provision of broadband personal communications services.

Due to a change in the Communications Act, it will not be necessary to notify the parties of this filing.

The Court has docketed this case as No. 95-1015 and the attorney assigned to handle the litigation of this case is James M. Carr.

Daniel M. Armstrong

cc: General Counsel  
Office of Public Affairs  
Shepard's Citations

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals  
For the District of Columbia Circuit

REC'D JAN 06 1995

TELEPHONE ELECTRONICS  
CORPORATION,

Petitioner,

v.

FEDERAL COMMUNICATIONS  
COMMISSION,

and

THE UNITED STATES OF AMERICA,

Respondents.

OFFICE OF  
GENERAL COUNSEL

DOCKET FILE COPY ORIGINAL  
RON GARVIN

95-1015

CASE NO. \_\_\_\_\_

United States Court of Appeals  
For the District of Columbia Circuit

FILED JAN 06 1995

RON GARVIN  
CLERK

PETITION FOR REVIEW

Telephone Electronics Corporation ("TEC") pursuant to 47 U.S.C. § 402(a), 28 U.S.C. §§ 2342 and 2344, and Rule 15(a) of the Federal Rules of Appellate Procedure, petitions this Court for review of two Orders issued by the Federal Communications Commission ("FCC") in a proceeding entitled In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253. The first Order is the Fifth Report and Order, 9 FCC Rcd 5532 (1994). A summary of the FCC's Fifth Report and Order was published in the Federal Register on July 22, 1994 at 59 Fed. Reg. 37,566. The second Order is the Fifth Memorandum Opinion and Order, FCC 94-285 (released November 23, 1994). A summary of this second Order was published in the Federal Register on December 7, 1994 at 59 Fed. Reg. 63,210. A copy of each Order is attached to this Petition.

In the Fifth Memorandum Opinion and Order, the FCC denied TEC's petition for reconsideration of the Fifth Report and Order which adopted rules governing eligibility to bid in the auction for licenses in the entrepreneurs' blocks for the provision of broadband personal communications services ("PCS"). The Fifth Memorandum Opinion and Order also denied TEC's request for reconsideration of the FCC's affiliation rules, its partitioning requirements, and its rules governing eligibility to receive bidding credits and to pay for winning bids in installments.

Relief from the FCC's Fifth Report and Order and Fifth Memorandum Opinion and Order is sought on the grounds that they are unlawful, arbitrary and capricious, not supported by substantial evidence, and otherwise not in accordance with law. The FCC acted arbitrarily and capriciously in applying its affiliation rules to small, rural telephone companies in spite of the fact that corporate and regulatory barriers prevent cross-pooling with their affiliates. National Ass'n. of Regulatory Util. Comm'rs. v. FCC, 737 F.2d 1095, 1128 (D.C. Cir. 1984), cert. denied, 469 U.S. 1227, 105 S. Ct. 1224 (1985).

The FCC's auction rules, which prohibit TEC's small, rural telephone companies from bidding directly on licenses during the entrepreneurs' block auctions, are also contrary to Section 309(j) of the Communications Act, 47 U.S.C. § 309(j), which mandates that the FCC "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-

based services." (Emphasis added.) Excluding TEC's rural telephone companies from the auction also ignores the Congressional mandate set forth in the section of the statute entitled "Design of Systems of Competitive Bidding" which directs the FCC to "disseminat[e] licenses" to rural telephone companies.

The FCC acted arbitrarily and capriciously, abused its discretion, and acted contrary to Section 309(j) of the Communications Act by disqualifying several small, rural telephone companies from the preferences available to other small businesses and imposing a partitioning system that severely restricts where small, rural telephone companies can provide broadband PCS. Furthermore, the FCC's choice of gross revenue criteria rather than net worth criteria as the basis for its eligibility rules is irrational as only net worth identifies the amount of funds that an entity actually has available to be used for bidding in an auction.

TEC is a privately-owned, small entrepreneurial company with its operations centered in rural areas. Its core business consists of six, small rural telephone companies. The FCC's Fifth Report and Order and Fifth Memorandum Opinion and Order prohibit these small, rural telephone companies from bidding directly on licenses during the entrepreneurs' blocks auction, a result contrary to Section 309(j) of the Communications Act.

TEC requests that this Court hold unlawful, vacate, enjoin and set aside both the Fifth Report and Order and the Fifth Memorandum Opinion and Order, and that the Court grant such other and further relief as may be proper and just under the circumstances.

Venue is proper under 28 U.S.C. § 2343.

Respectfully submitted,

TELEPHONE ELECTRONICS  
CORPORATION

By: 

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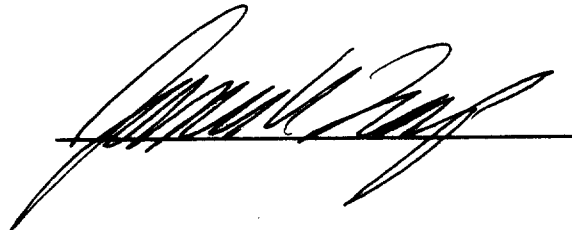
Dated: January 6, 1995

CERTIFICATE OF SERVICE

I hereby certify that on January 6, 1995, copies of the foregoing Petition for Review were served by express mail upon:

Janet Reno  
Attorney General  
United States Department of Justice  
10th and Pennsylvania Avenue, N.W.  
Washington, D.C. 20530

William E. Kennard  
General Counsel  
Federal Communications Commission  
1919 M Street, N.W., Rm. 614  
Washington, D.C. 20554

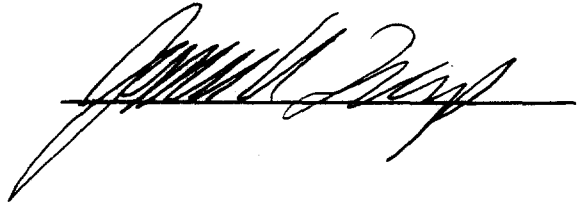
A handwritten signature in dark ink, appearing to read "William E. Kennard", is written over a horizontal line.

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I hereby certify that on January 6, 1995, copies of the foregoing Petition for Review were served by express mail upon:

Janet Reno  
Attorney General  
United States Department of Justice  
10th and Constitution Avenue, N.W.  
Room 4400  
Washington, D.C. 20530

William E. Kennard  
General Counsel  
Federal Communications Commission  
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